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Supreme Court, U.S.
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In the Supreme Court of the United States

DWAIN LEE KIRKLAND,

Petitioner,

v.

CHRISTOPHER K. TAMPLIN &
KELLY TAMPLIN et. al,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Georgia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the trial court and the Court of Appeals of Georgia violate Plaintiff/Petitioner's right to 14th Amendment Due Process and/or Equal Protection of the laws, in their rulings on what constitutes a simultaneous filing of two civil complaints.

2. Did the trial court and the Court of Appeals of Georgia violate Plaintiff/Petitioner's right to 14th Amendment Due Process and/or Equal Protection of the laws, in their rulings on the re-cusals of trial level judges Tice and Bailey.

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OCGA 9-2-5(a)

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Other Authorities:

None

OPINIONS BELOW

Petition for a Writ of Certiorari was denied in a 4/3 split decision by the Supreme Court of Georgia on June 25th, 2007 (App., infra, 36a). The Court of Appeals of Georgia handed down its 11 page written decision on case #A07A0663 on February 1st, 2007 (App., infra, 29a). The trial court granted defendant's dismissal on September 22nd, 2006 (App., infra, 26a). The trial court had earlier granted defendant's dismissal on April 28th, 2006 (App., infra, 17a) but vacated that order on May 2nd, 2006 (App., infra, 18a).

JURISDICTION

The state court of last resort in this case was the Supreme Court of Georgia. Their order denying a Writ of Certiorari was entered on June 25th, 2007. The jurisdiction of this Court is invoked under **28 USCS § 1257. State courts; certiorari.** In relevant part:

"(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari where...any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of...the United States.

(June 25, 1948. ch 646, § 1, 62 Stat. 929; July 29, 1970, P. L. 91-358, Title I, Part D, Subpart 2, § 172(a)(1), 84 Stat. 590; June 27, 1988, P. L. 100-352, § 3, 102 Stat. 662.)"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the U.S. Constitution, the Supremacy clause, provides in relevant part:

"[T]he Laws of the United States...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment V to the U.S. Constitution provides in relevant part:

"[N]or be deprived of life, liberty, or property, without due process of law..."

Amendment XIV, Section 1 to the U.S. Constitution provides in relevant part:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

OCGA 9-2-5(a): ***Title 9, Chapter 2, Section 5 (9-2-5)***

(a) No plaintiff may prosecute two actions in the courts at the same time for the same cause of action and against the same party. If two such actions are commenced simultaneously, the defendant may require the plaintiff to elect which he will prosecute. If two such actions are commenced at different times, the pendency of the former shall be a good defense to the latter.

STATEMENT

A. Court Rulings Below

The Supreme Court of Georgia denied Plaintiff/Petitioner a Writ of Certiorari in a 4/3 split decision. The Court of Appeals of Georgia handed down an 11 page opinion that essentially repealed the middle sentence of Official Code of Georgia Annotated 9-2-5 which allows for a simultaneous filing of 2 or more complaints. This statute and the precedent flowing from it had been in place and unchanged since its passage by the Georgia legislature in 1863, 144 years ago. The Court of Appeals also denied recusal of two judges who stood accused by Plaintiff/Petitioner of being part of a system of bias and prejudice known as The Good Ol' Boy Network. These re-cusals were denied despite the fact that defendants submitted no affidavit or sworn testimony to rebut Plaintiff/Petitioner's allegations. Plaintiff/Petitioner was denied his rights to Due Process and Equal Protection under the 14th Amendment.

B. Facts of the Case

This case is based on a 37 count complaint comprised of three torts: Interference with Business Relations, Intentional Infliction of Emotional Distress and Interference with Contractual Relations.

The Plaintiff/Appellant filed two identical complaints, one each in Madison and Franklin Counties Georgia on November 14th, 2005 at 12:53 P.M. and 2:07 P.M., respectively: 74 minutes apart. The Franklin County case is the subject of this petition. The Franklin County case, though filed second, was actually served first on November 16th, 2005; while the Madison County case was served on November 17th, 2005.

Plaintiff/Petitioner's reasoning for the simultaneous filing was that he thought the Defendants, though husband and wife, legally resided in two different counties; and he did not want to suffer the consequences of "vanishing venue" in the subsequent trial. See (M.T. 04/26/06, P. 6, L. 18).

The Defendants, in their response to the complaint, listed "prior Pending" as their Eleventh Defense, but did not file a Motion to Dismiss based on that defense at that time.

Plaintiff/Appellant then propounded Interrogatories and Production of Documents to Defendant Kelly Tamplin, who he thought legally resided in Franklin County, to establish a proper venue.

"Until the question of jurisdiction is determined by the court having power to pass thereon, no other court should interfere." Wilson v. Atlanta, K. & N. Ry., 115 Ga. 171, (41 S.E. 699).

Soon after propounding the discovery, Plaintiff/Petitioner was able to establish that Defendant Christopher K. Tamplin, thought to legally reside in Madison County, was in fact registered to vote there; and Defendant Kelly Tamplin, thought to legally reside in Franklin County, did in fact have a homestead exemption there. Plaintiff/Appellant then amended the original complaints in both Madison and Franklin Counties to drop Christopher K. Tamplin from the Franklin County case and Kelly Tamplin from the Madison County case. Plaintiff/Petitioner was not aware at this time that he also had to file a motion to fully accomplish the task of dropping a party defendant. Any later motion has been ruled by the Court of Appeals to be retroactive to the date of the amended complaint. See BIL-JAX, INC. v. SCOTT, 73944, 183 Ga. App. 516, (359 SE2d 362) (1987).

Twenty-three days after Plaintiff/Petitioner amended the complaints and 114 days after Defendants had filed a response to the original complaint, Defendant Tamplin filed a Motion to Dismiss based on the "prior pending" doctrine contained in the original response (App., infra, 3a). Plaintiff/Petitioner argued in the hearing on Defendant's motion, that it had not been timely filed. See (M.T. 04/26/06, P. 5, L. 9).

Plaintiff/Appellant also argued that Defendant's motion lacked merit because his actions were "commenced simultaneously" under O.C.G.A. 9-2-5 and he should be allowed to "elect which he will prosecute." See (M.T. 04/26/06, P. 5, L. 15).

Defendant Tamplin intentionally left the middle sentence of O.C.G.A. 9-2-5: "If two such actions are commenced simultaneously, the defendant may require plaintiff to elect which he will prosecute."; out of their motion/brief (App., infra, 3a, Page 1, paragraph 2) and could not and did not cite a single case where complaints filed on the same day were not considered "commenced simultaneously" by the Georgia appellate courts (M.T. 04/26/06 P. 4, L. 12).

Plaintiff/Petitioner cited CLARK et al. v. WEAVER et al, 62307, 159 Ga. App. 594, (284 SE2d 95) (1981).

In spite of this, trial court judge Lindsay Tice, who had shown extreme contempt and disdain for the Plaintiff/Petitioner throughout the hearing, issued an immediate bench ruling dismissing the case, rather than allowing Plaintiff/Petitioner to "elect which he will prosecute." The judge's order, paragraph 2, Line 5 states : "[T]he two cases were not filed simultaneously...." (App., infra, 17a).

Plaintiff/Petitioner had already made his election by amending the complaints. Defendant's only legal remedy at this time was to require Plaintiff/Petitioner to fully complete his election by filing a motion to drop Christopher K. Tamplin as a party defendant from the Franklin County case and Kelly Tamplin as a party defendant from the Madison County case.

Plaintiff/Petitioner moved to recuse trial judge Tice for the same pattern of extra-judicial communications and resulting prejudice that he had been earlier subjected to in the courts of Madison County and the Northern Judicial Circuit. Motion (App., infra, 12a), affidavit (App., infra, 14a). Judge Tice vacated his order granting dismissal (App., infra, 18a, erroneously titled Motion to Dismiss), found Plaintiff/Appellant's affidavit to be legally sufficient and the motion was heard on June 20th, 2006. The Defendants were not however required to supply any evidence to rebut Plaintiff/Petitioner's sworn affidavit concerning the misconduct of the trial court judge, which Plaintiff/Appellant objected to (M.T. 06/20/06 P. 15, L. 9). The motion was denied by Pro Hac Vice Judge John Bailey (App., infra, 19a).

Plaintiff/Petitioner then moved to recuse Pro Hac Vice Judge Bailey due to the ongoing pattern of behavior in the courts of Madison County and the Northern Judicial Circuit. Plaintiff/Petitioner had, at this point, filed four motions to recuse three judges although he had witnessed misconduct from all five judges that he had been exposed to. Plaintiff/Petitioner likened this systematic exercise of prejudice and bias in favor of law firms to the "The Good Ol' Boy Network." This is the same systematic exercise of prejudice and bias that Plaintiff/Petitioner encountered in the Georgia appellate courts. See motion (App., infra, 20a) and affidavit (App., infra, 22a, Item #8).

Pro Hac Vice Judge Bailey responded with an order stating that he was not the sitting judge and the recusal was not timely filed (App., infra, 25a), even though Plaintiff/Appellant had included in his affidavit a sworn copy of a letter from Defendant's counsel showing that neither party had been aware of, or received a copy of the order at the time of its issue. Plaintiff/Petitioner also stated in his affidavit Item #12 that he filed his motion on the same day that he became aware that an abusive ruling had been issued. Plaintiff/Petitioner then requested an Interlocutory Appeal Certificate from Judge Bailey and Judge Tice by letter. The letter was faxed and mailed to the judges' offices on the same day it was written. The request was ignored and the original order dismissing the case was reinstated by Judge Tice (filed 09/27/06, App., infra, 26a, please note the first paragraph regards the Motion to Recuse Judge Tice and the second

paragraph regards the reinstatement).

Defendant Tamplin subsequently filed a motion for in excess of $4,000 in attorney's fees and expenses under O.C.G.A. 9-15-14 (a) and (b). Defendant Kelly Tamplin, when faced with a motion to transfer her from the Madison County venue back to Franklin County, eventually filed a waiver of venue in Madison County so that she could be legally tried there without the possibility of "vanishing venue." Plaintiff/Petitioner twice offered to abstain from or dismiss his appeal if Defendant would withdraw her motion for attorney's fees and expenses. She would not. Defendants are very aware of the prejudice they enjoy in the Georgia court system. They have enjoyed it now through case #06-138, the instant case and the companion case that was filed in Madison County.

Plaintiff/Petitioner filed his notice of appeal on October 23rd, 2006 (App., infra, 27a), then responded to Defendant's motion for attorney's fees and expenses on October 25th, 2006. The motion for attorney's fees and costs in the Franklin County trial court has already been heard though not ruled upon despite the fact that Plaintiff/Petitioner twice moved for a continuance because the case was not *res judicata,* because this court, The Supreme Court of the United States has the final word and it has not yet spoken. The trial courts of Georgia not only do not respect the rights of their litigants, they have neither fear of, nor respect for, the Supreme Court of the United States.

The Court of Appeals issued its opinion, a binding precedent, on the instant case on February 1st, 2007 (App., infra, 29a). The Supreme Court of Georgia denied Certiorari on June 25th, 2007 (App., infra, 36a). This petition is due on September 23rd, 2007, a Sunday. It is being shipped via U.S. Mail no later than Monday September 24th, 2007.

C. Question #1

Did the trial court and the Court of Appeals of Georgia violate Plaintiff/Petitioner's rights to 14th Amendment Due Process and/or Equal Protection of the laws, in their rulings on what constitutes a simultaneous filing of two civil complaints.

The issue of the simultaneous filing of the complaints was first raised by defendant's Motion to Dismiss (App., infra, 3a) and Plaintiff/Petitioner's Answer, Affidavit and Brief (App., infra, 5a, 7a & 9a) in the trial court, based on state law, thus bringing those issues

under the protection of the 14th Amendment. At page 2 of Plaintiff/Petitioner's answer, he also prays for "such other and further relief as may be granted under the law."

There is a reason why the novel *Deliverance* was written about Georgia. I grew up here. I came back as another writer once advised a person not to do. I may never live to leave again.

Georgia is corrupt. Georgia rapes people. I do not know what else to say. I brought case #06-138 to this court in October 2006 thinking I had been discriminated against by the Georgia Supreme Court due to a disability and a past religious affiliation. I don't believe that was true now. What is true is that there is no rule of law in Georgia for anyone. After bringing 4 subsequent actions to the lower and appellate courts in Georgia, I have seen a pattern of actual criminal RICO conduct emerge. There was actually federal criminal conduct in case #06-138. Due to having read a book that advised against bringing scandalous material before this court, I left out the part about a $250,000 tax fraud and the trial court and the Georgia Supreme Court issuing rulings that covered it up. The Affirmance without Written Opinion (App., infra, 2a) in that case was actually issued in order not to address the discovery of the fraudulent tax return. By the standards of their own Judicial Canon, the Georgia Supreme Court was required to report this crime to the proper authorities. They did not. Is this court required to do the same? Is this court also required to report the Georgia Supreme Court's Complicity in a federal crime?

There was also another reason the Georgia Supreme Court returned an Affirmance without Written Opinion on Case #06-138. The opposing law firm in that case had to be delivered a victory. There is no rule of law in Georgia. The Georgia Supreme Court does not base its opinions on law. It bases them on favoritism, cronyism, the favored party must always win. The appellate and lower courts in Georgia first look at the law firms involved, and then if no favorite emerges they look at the litigants, and then if no favorite emerges they look to their own judicial and extra-judicial political requirements. It is only then that they write an opinion based on whatever favored party or principle finally emerged. The law as it was passed by the legislature and set by precedent has no part in it.

This is Judicial Activism at its worst. And yet Roe v. Wade is another example of a ruling by a court of law based on extra-judicial political requirements. A special interest group wanted abortion on demand as an extra-judicial political requirement and the court delivered.

The reason I mention Roe is that it was and is a slippery slope and wound up here.

"This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

"The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

"Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

"If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, **to limit a power in its own nature illimitable." MARBURY v. MADISON, 5 U.S. (1 Cranch) 137, 176-177 (1803).**

"Some members of Congress were doubtful—why shouldn't every litigant have a right to get a decision on his case from the Supreme Court? Chief Justice Taft responded that in each case, there had already been one trial and one appeal. "Two courts are enough for justice," he said. To obtain still a third hearing in the Supreme Court, there should be some question involved more important than just who wins this lawsuit. ...No longer did the Court have to hear almost every case an **unhappy litigant** presented to it. Instead, for the most part, the Court could select only those relatively few cases involving issues important enough to require a decision from the Supreme Court." *The Third Branch, Vol. 36, Number 1—January 2004*

"Two courts are enough for justice," Chief Justice Taft on the Judiciary/Certiorari Act of 1925.

"While the cat's away, the mice will play. And they've played and played and played and played," United States constitutional citizen,

unhappy litigant and Plaintiff/Petitioner Dwain Lee Kirkland.

I do wonder if the editors of *The Third Branch* have any idea just how bigoted their above pronouncements sound to Joe Average Citizen.

"Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it." Learned Hand.

"As a general usage, 'activist judge' is used to describe a judge who actively and knowingly subverts, misuses, grossly misinterprets, ignores, or otherwise flaunts the law and or legal precedence due to personal opinion, be that opinion ideological, religious, philosophical, **or other."**

The appellate courts in Georgia fall under **"other."**

"Detractors of judicial activism charge that it usurps power of the legislature, thereby diminishing **the rule of law** and democracy. They argue that the judicial branch has no legitimate grounds to overrule policy choices of duly elected representatives, absent a real conflict with the constitution."

In Georgia, does democracy or **rule of law** exist when the law is merely what judges and justices say it is.

"Judicial Activism: **ruling against the text** or intent of a statute, using what critics argue is an incorrect or overreaching interpretation; **ruling against judicial precedent** in a way that is a radical or unjustified departure from accepted interpretation. This **can violate a judge's sworn allegiance** to uphold the constitution, because, in effect, it encourages judges to write their own constitutions. The purpose of the judiciary is to interpret existing laws and policies, any action that is not done strictly in accordance with existing law must be activism. Indeed, the legislative branch is explicitly empowered by the constitution to make law, and the constitution deliberately has an amendment process. Consequently, any change to the laws or the constitution outside this framework is itself illegal."

(The above quotations are from non-copyright sources.)

"It is still in the lap of the gods whether a society can succeed which is based on 'civil liberties and human rights' conceived as I have tried to describe them; but of one thing at least we may be sure: the alternatives that have so far appeared have been immeasurably worse." Learned Hand

Some of the members of this court hold their own opinions on Judicial Activism.

"Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure

everybody plays by the rules. But it is a limited role. Nobody ever went to a ballgame to see the umpire." Chief Justice Roberts, Senate confirmation hearing.

"[M]y belief that a policy of judicial restraint — one that allows other decisional bodies to have the last word in legal interpretation until it is truly necessary for this Court to intervene — enables this Court to make its most effective contribution to our federal system of government." Justice Stevens, Michigan v. Long, 1983.

"Measured motions seem to me right, in the main, for constitutional as well as common law adjudication. Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable," Justice Bader Ginsburg in discussions of Roe v. Wade.

"I intend to go right on appointing highly qualified individuals of the highest personal integrity to the bench, individuals who understand the danger of short-circuiting the electoral process and **disenfranchising the people through judicial activism."** President Ronald Reagan.

Your Plaintiff/Petitioner has been disenfranchised **"through judicial activism."**

I sincerely apologize if anyone was misquoted.

This case of Judicial Activism started as follows:

Plaintiff/Petitioner prepared 2 identical complaints against Defendants Christopher K. and Kelly Tamplin, husband and wife. The couple maintains two residences. Christopher K. Tamplin legally resides in Madison County Georgia and Kelly Tamplin legally resides in Franklin County Georgia. Plaintiff/Petitioner lives in Madison County about 8 miles from the court house. He got in his car on November 14th, 2005 and filed the first complaint at the Madison County Government Complex at 12:53 P.M. (This complaint was served on both defendants in neighboring Clarke County on November 17th, 2005 by service on Christopher Tamplin at his place of employment.) Plaintiff/Petitioner returned to his car and drove about 20 miles to Franklin County stopping at Defendant Kelly Tamplin's residence along the way to confirm the address for service, then drove another 10 miles to the Franklin County courthouse and filed the second complaint at 2:07 P.M. (This complaint was served on both defendants at Kelly Tamplin's residence on November 16th, 2005.) As one can easily see, the complaints were filed 74 minutes apart on the same day without service being perfected on either till 2 and 3 days later. Also, the Franklin County case, though filed second, was actually served first on November 16th, 2005; while the Madison County case was served November 17th, 2005.

OCGA 9-2-5 is Georgia law on the simultaneous filing of 2 or

more complaints. It was first passed by the legislature at the height of the Civil War in 1863, 144 years ago. The copy of the 1873 code $2894 (2843) that I located reads as follows:

Plaintiff required to elect between suits. *No suitor is entitled to prosecute two actions in the Courts of this State at the same time, for the same cause and against the same party, and in such a case the defendant may require the plaintiff to elect which he will prosecute, if commenced simultaneously; and the pendency of the former is a good defense to the latter, if commenced at different times.*

The current code section OCGA 9-2-5:

Title 9, Chapter 2, Section 5 (9-2-5)

(a) No plaintiff may prosecute two actions in the courts at the same time for the same cause of action and against the same party. If two such actions are commenced simultaneously, the defendant may require the plaintiff to elect which he will prosecute. If two such actions are commenced at different times, the pendency of the former shall be a good defense to the latter.

Defendant's prefaced their motion to dismiss on the "prior pending" doctrine contained in the last sentence of the law: *"the pendency of the former shall be a good defense to the latter."* *Pendency* is defined in the state of Georgia as an action having been both filed and served on the defendants and thus pending in court awaiting an Answer or Response. Since neither of the complaints in the instant case had been served in the 74 minutes between their respective filings, neither qualified for the "prior pending" doctrine until the Court of Appeals rewrote the law from the bench. Looking at the plain language of the law, if neither had been served and neither was in a state of *"pendency,"* plain common sense would dictate that both would default to the middle sentence of the law: *"If two such actions are commenced simultaneously, the defendant may require the plaintiff to elect which he will prosecute."* This hypothesis is completely consistent with 144 years of precedent on the subject statute

while Defendant's position and the Court of Appeals opinion are not.

Wilson v. Atlanta, Knoxville and Northern Railway Company, 115 Ga. 171, 41 S.E. 699 (1902) is *the* case to which all others look on this issue. In Wilson Georgia Supreme Court Justice Lumpkin gives an exhaustive multi-page analysis of "the Connecticut rule" on which (2894) and later O.C.G.A. 9-2-5 were based. Item 2 of the bill of errors, now known as an enumeration of errors, states: "Whether or not a court in which such a declaration has been filed and **duly served**...."

At page 172, the "plea in abatement," now asserted in the answer as the "prior pending" doctrine is quoted as stating: "that 'said suit was **duly served** upon the defendant in said case, and the same is now pending in said court undisposed of,'...."

At page 179 it is further stated: "It seems to follow incontrovertibly from what has been said that the only reasonable rule is, that save when--because of void process; failure to comply with statutory conditions precedent to bringing suit; instituting the action in a court having no jurisdiction of the subject-matter thereof, failure to give the suit **standing in court**, by omitting to perfect **legal service;** or because of other like reasons, which the defendant is bound to know render it unnecessary to appear and plead...the plea in abatement should be sustained."

Obviously per *Wilson*, the Madison County action had not been **"duly served"** in the 74 minutes before the Franklin County suit was commenced and had no **"standing in court"** on which to base the "prior pending" doctrine. A suit that has not been served is a nullity on which nothing can be based.

One might think this was just an extreme stupidity on the part of the Georgia appellate courts until one has seen similar upwards of 40 times on as many different legal arguments. One then knows that it is an extremely calculated stupidity called The Good Ol' Boy Network.

Of the precedent, the facts of *Cherry v. Gilbert* are closest to the instant case:

"2. Under Code 3-601 [OCGA 9-2-5] the pendency of a former action is a good defense to a second action brought by the same plaintiff against the same defendant and involving the same cause of action as in the former suit. Further, in McPeake v. Colley, 116 Ga. App. 320, 322 (157 SE2d 562) it was held that a motion for summary judgment will lie to the second suit since it cannot be tried as long as the first suit is pending.

"3. But what constitutes a 'suit pending?' The filing of the petition without service does not operate to commence a suit and **no suit is pending until it has been served.** See Nicholas v. British America

Assur. Co., 109 Ga. 621 (34 SE 1004); Brunswick Hardware Co. v. Bingham, 110 Ga. 526 (35 SE 772); Ferguson v. New Manchester Mfg. Co., 51 Ga. 609; Cherry v. North & South R., 65 Ga. 634 (1); McClendon v. Hernando Phosphate Co., 100 Ga. 219 (2) (28 SE 152); Florida Central &c. R. Co. v. Ragan, 104 Ga. 353, 356 (30 SE 745).

"4. The record shows that the Fulton Superior Court records as to case No. B-56060 reveal no service but in lieu thereof the filing of a 'non est' [*non est inventus*: "he is not found"]. **Consequently, suit was not pending between the same parties and involving the same cause of action in that court, and the court erred in granting the motion for summary judgment based on such contention. CHERRY v. GILBERT, 46520 (124 Ga. App. 847) (2) (186 SE2d 319) (1971).**

As stated above, all precedent, including those cases cited by the Court of Appeals in its opinion, adhere to Plaintiff/Petitioner's interpretation of OCGA 9-2-5. Plaintiff/Petitioner had chosen to pursue Christopher K. Tamplin in Madison County and Kelly Tamplin in Franklin County and had amended the complaints in each county to drop the redundant defendant.

"2. OCGA 9-2-5 provides in pertinent part, as follows: 'No plaintiff may prosecute two actions in the courts at the same time far the same cause of action and against the same party. If two such actions are commenced simultaneously, the defendant may require the plaintiff to elect which he will prosecute.' **In such a situation, the 'plaintiff must select the case he will pursue and the others must be dismissed.'** Clark v. Weaver, 159 Ga. App. 594, 595 (284 SE2d 95) (1981)." **LINER et al. v. NORTH, 74676 (184 Ga. App. 74) (2) (360 SE2d 637) (1987).**

Liner and its quoted predecessor *Clark* both align perfectly with the plain language of the law, their predecessor *Wilson,* and Plaintiff/Petitioner's interpretation of the law. In *Liner* two suits were filed the same day in the Walker County Probate and Superior Courts. These were accepted as being "simultaneous" per OCGA 9-2-5 but the Plaintiffs refused to select which they would pursue so one of the cases was dismissed.

In *Clark v. Weaver,* quoted in *Liner* above, there were 3 complaints filed in different courts in different counties. These were also accepted as "simultaneous" per OCGA 9-2-5 but here again the Plaintiff refused to select which he would pursue resulting in dismissal.

In the instant case, Plaintiff/Petitioner did not refuse to select which he would prosecute, the complaints had already been amended.

The ruling in the instant case was a plain and intentional departure from the law and the appellate courts of Georgia are bound to uphold that

law by statute duly passed by the legislature:

Title 1, Chapter 3, Section 1 (1-3-1)

(a) In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy. Grammatical errors shall not vitiate a law. A transposition of words and clauses may be resorted to when a sentence or clause is without meaning as it stands.

OCGA 1-3-1 as case law:

"A cardinal rule of construction is that **the legislative intent shall be effectuated,** even though some verbiage may have to be eliminated. **The legislative intent will prevail** over the literal import of the words. [Citations]." Carroll v. Ragsdale, 192 Ga. 118, 120 (15 SE2d 210). **INTERNATIONAL MINERALS & CHEMICAL CORPORATION v. BLEDSOE, 47029 (126 Ga. App. 243) (190 SE2d 572) (1972).**

"(2)(a) In reaching this conclusion, we find several rules of statutory construction useful. The first is that, in ascertaining the purpose of legislation, courts may look to the history of the legislation on the subject matter of the particular statute. International Minerals &c. Corp. v. Bledsoe, 126 Ga. App. 243, 244 (190 SE2d 572) (1972)." **GEORGIA MENTAL HEALTH INSTITUTE et al. v. BRADY (two cases) S93A0976, S93A0977 (263 Ga. 591) (2)(a) (436 SE2d 219) (1993).**

"In interpreting statutes, the cardinal rule of construction is to ascertain the legislative intent, 'keeping in view at all times the old law, the evil, and the remedy.' **OCGA 1-3-1(a).** Courts should apply the plain meaning to all words, except words of art. All statutes relating to the same subject matter are construed together to ascertain the legislature's intention unless the statutory language is clear." **MILLER et al. v. GEORGIA PORTS AUTHORITY, S95G1719 (266 Ga. 586) (470 SE2d 426) (1996).**

If one looks very carefully at page 3 section 2(a) (App., infra, 30a) of the Court of Appeals opinion, and follows the ruling to its logical conclusion; it will clearly be seen that Court of Appeals of Georgia has effectively repealed, without an act of the legislature, the middle sentence of OCGA 9-2-5 concerning simultaneous filings. The Court of Appeals

has legislated from the bench. Under its opinion in the instant case, if 2 complaints were filed 1 second apart and then subsequently served, the first served would refer back to its original time of filing and become the "former" case "which shall be a good defense to the latter."

Simultaneous filing is history. This is not what the legislature of 1863 intended. This is The Good Ol' Boy Network hard at work.

Here is yet another example of The Good Ol' Boy Network hard at work. Justice Smith in vociferous dissent:

"Where there is a physical injury or pecuniary loss, compensatory damages include recovery for accompanying 'mental pain and suffering' even though the tortious conduct complained of is merely negligent." Westview Cemetery v. Blanchard, 234 Ga. 540, 543 (216 SE2d 776) (1975). (Emphasis supplied.) See also Montega Corp. v. Hazelrigs, 229 Ga. 126 (189 SE2d 421) (1972); Candler v. Smith, 50 Ga. App. 667 (179 SE 395) (1934). This has been the rule in Georgia at least **since 1892, when this court decided Chapman** v. Western Union Telegraph Co., 88 Ga. 763 (15 SE 901) (1892). (Note: The Chapman case involved a claim for mental pain and suffering only, and the court there carefully distinguished cases involving pecuniary damages, in which recovery for pain and suffering has been allowed. 88 Ga. at 767.)

"Here we are presented with a clear case of pecuniary loss occasioned by appellee's negligent conduct, and an equally clear claim for pain and suffering in the form of the indignity and embarrassment suffered by Hamilton when he followed appellee's legal advice and was indicted and tried as a criminal as a result. Unless the above-cited cases can be distinguished, Hamilton is entitled to keep the nearly $1 million awarded him for mental anguish by the jury. Instead, **the Court of Appeals and six members of this court** hold that the pain and suffering award must be reversed. To me, this means one of two things: either the cases cited have been overruled to the extent they hold that, in a negligence case, damages for mental pain and suffering may lie where the claimant proves physical injury or pecuniary loss; **or, as a policy matter, legal malpractice claims will be treated differently from other negligence cases by the appellate courts of this state.** If the first proposition is true, we should say so; the second proposition does not deserve to be dignified by a response. In either event, I strongly disagree with either basis for the majority's holding in this case.

"I would rule that damages for emotional distress are recoverable under a negligence theory even in the absence of a physical injury or 'impact.' This is the nearly unanimous view of scholars who have addressed the problem, see, e.g., Goodrich, Emotional Disturbance as

Legal Damage, 20 Mich.L.Rev. 497 (1922); Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv.L.Rev. 1033 (1936); Prosser, Handbook on the Law of Torts 327 (4th ed. 1971). Numerous state courts also follow this view. See Annot., 64 ALR2d 100. As Dean Prosser has stated: 'It is now more or less generally conceded that the only valid objection against recovery for mental injury is the danger of vexatious suits and fictitious claims, which has loomed very large in the opinions as an obstacle. The danger is a real one, and must be met. Mental disturbance is easily simulated, and courts which are plagued with fraudulent personal injury claims may well be unwilling to open the door to an even more dubious field. But the difficulty is not insuperable. Not only fright and shock, but other kinds of mental injury are marked by definite physical symptoms, which are capable of clear medical proof. It is entirely possible to allow recovery only upon satisfactory evidence and deny it when there is nothing to corroborate the claim, or to look for some guarantee of genuineness in the circumstances of the case. The problem is one of adequate proof, and it is not necessary to deny a remedy in all cases because some claims may be false.' Id. at 328.

"I would reverse the judgment of the Court of Appeals, thereby reinstating the jury verdict for general damages arising from Hamilton's mental distress. I therefore dissent." **HAMILTON v. POWELL, GOLDSTEIN, FRAZER & MURPHY et al., 40220 (252 Ga. 149) (311 SE2d 818) (1984).**

I was told by my father, Chief of Game and Fish in Georgia, when I was a teenager, that when it came to confiscation of people's cars, boats, etc. due to supposed violations of hunting and fishing regulations: "We just made it up as we went along."

Both *Hamilton* above and the instant case are examples of a Georgia institution in charge of the law willfully engaging in "We just made it up as we went along."

Please note that a 3 judge panel of The Court of Appeals and 6 justices of the Supreme Court of Georgia willfully participated in this judicial lynching of Plaintiff Hamilton to benefit the law firm of Powell, Goldstein, Frazer & Murphy. Please note that 92 years of case law from *Chapman* on was not overruled but simply denied an existence in order to deliver a victory to Powell, Goldstein, Frazer & Murphy. In the instant case, 144 years of precedent and the plain language of the law was not overruled but simply denied an existence in order to deliver a victory to the law firm opposing me.

And yet a citizen of Georgia, such as myself, is required by

OCGA 1-3-6 to know the law:

Title 1, Chapter 3, Section 6 (1-3-6)

After they take effect, the laws of this state are obligatory upon all the inhabitants thereof. ***Ignorance of the law excuses no one.***

"Failure to comprehend the legal effect of making an admission provides no excuse for the maker; **'[i]gnorance of the law excuses no one.'** OCGA 1-3-6; see also Bragg v. Bragg, 225 Ga. 494, 496 (170 SE2d 29)." **JABALEY et al. v. JABALEY, A93A0353 (208 Ga. App. 179) (1) (430 SE2d 119) (1993).**

And yet how can the law be known when the courts of this state "We just made it up as we went along."

"Appellant contends that this section is violative of the due process provisions of the State and Federal Constitutions because it is **so vague, uncertain and indefinite that it fails to inform persons charged thereunder of the conduct proscribed thereby." STULL v. THE STATE, 27478, 27479 (230 Ga. 99) (1) (196 SE2d 7) (1973).**

How can any law "We just made it up as we went along" not be **"so vague, uncertain and indefinite that it fails to inform persons charged thereunder of the conduct proscribed thereby."**

In the instant case, Kirkland v. Tamplin, both the trial court and the appellate courts of the state of Georgia "We just made it up as we went along." This "We just made it up as we went along" violated both Plaintiff/Petitioner's rights to Due Process and Equal Protection of the Laws under the 14th Amendment.

"An equal protection claim arises when an individual contends that he is receiving different treatment from that received by other individuals similarly situated; the essence of the claim is that certain action is taken against the plaintiff because of his membership in a particular class and that given the circumstances of the case or the nature of the clients, **such action is arbitrary and illegal**; the clause is not necessarily violated only upon a showing that similar action was taken against the entire class. Bleakley v. Jekyll Island-State Park Auth., 536 FSupp. 236 (1982). A preliminary step in equal protection analysis is to determine whether persons who are similarly situated are subject to disparate treatment. Johnson v. Smith, 696 F2d 1334 (1983). Moreover, a successful equal protection claim requires showing of purposeful

discrimination. Smith v. State of Ga., 684 F2d 729 (1982)." **SPENCER et al. v. MCCARLEY MOVING & STORAGE COMPANY, INC. et al., 69548 (174 Ga. App. 525) (1) (330 SE2d 753) (1985).**

"Appellant's claim that he was deprived of his civil rights is based on 42 USC 1983 which provides: 'Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any **rights, privileges, or immunities secured by the Constitution** and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.' It is well established that '[a] plaintiff in a 1983 action must show (1) "that he has been deprived 'of a right secured by the "constitution and laws" of the United States,' " and that (2) the defendant acted under color of state law. The Supreme Court [has] set forth an analysis of the "under-color-of-state-law" part of the foregoing two-part requirement. The conduct causing the deprivation must be fairly attributable to the state in order to be conduct "under-color-of-state-law." ' Poss v. Moreland, 253 Ga. 730, 731 (324 SE2d 456) (1985). **FRANKLIN v. PIGGLY WIGGLY FOOD SOUTHERN, INC. et al., 70148 (175 Ga. App. 20) (1) (332 SE2d 329) (1985).**

"(2)(d) The trial court properly granted the motion for directed verdict with respect to Patterson's claim of a violation of public duty. This claim seems to be that the defendants willfully and wantonly violated their public duty by injuring Patterson's business, depriving him of the use and enjoyment of his property and depriving him of equal protection of the laws under the Ga. Const. 1983, Art. I, Sec. I, Pars. I and II. The part of this count which alleges that the public officials deprived him of the use and enjoyment of his property is discussed in subparts (b) and (c) above. As is discussed above, this part of the claim is without merit since there was no **'taking' shown** and because there was no evidence of intent to interfere with his business.

"The portion of this count which alleges that Patterson was denied equal protection of the laws is also without merit. **A successful equal protection claim** requires a showing of purposeful discrimination. Spencer v. McCarley Moving &c. Co., 174 Ga. App. 525 (330 SE2d 753 (1985); Smith v. State of Ga., 684 F2d 729 (11th Cir. 1982), appeal after remand, 749 F2d 683 (11th Cir. 1985). The claim requires that the action taken by the government was **arbitrary and illegal.** See Spencer, supra at 528. Absent an implication of a fundamental right or a suspect classification, local economic regulation is presumed constitutional under

equal protection if it is rationally related to legitimate state interests. Silverstein v. Gwinnett Hosp. Auth., 861 F2d 1560 (11th Cir. 1988).

"(2)(e) The trial court properly directed a verdict on Patterson's hodgepodge claim under 42 USC 1983. Essentially, this claim alleges that the police conspired to force him out of business and thereby violated his constitutional right to pursue an occupation. In appropriate circumstances, 42 USC 1983 allows redress for arbitrary interference in, and harassment of, a business by the police. See, e.g., Benigni v. City of Hemet, 879 F2d 473 (9th Cir. 1988) 1; Lykken v. Vavreck, 366 FSupp. 585, 587-599 (D.C. Minn. 1973).

"In order to pursue an action of this nature, a plaintiff ' "must show (1) 'that he has been deprived "of a right secured by the 'constitution and laws' of the United States," ' and that (2) the defendant acted under color of state law." ' Franklin v. Piggly Wiggly, 175 Ga. App. 20, 21 (332 SE2d 329) (1985). We can find no deprivation of a federal constitutionally protected interest resulting from an abuse of governmental power sufficient to maintain this claim. See Rymer v. Douglas County, 764 F2d 796, 801 (11th Cir. 1985). Furthermore, there was no evidence that the county and police actions constituted a deprivation of Patterson's constitutional rights pursuant to **an impermissible or corrupt policy which was intentional and deliberate.** See Cave Spring v. Mason, 252 Ga. 3 (310 SE2d 892) (1984). As a matter of law, the evidence Patterson presented did not rise to the level of egregiousness necessary to maintain an action under 1983 and the trial court properly directed the verdict on this claim." **PATTERSON v. BUTLER et al., A91A0546, A91A0725 (200 Ga. App. 657) (2)(d)(e) (409 SE2d 531) (1991).**

As well as an Equal Protection violation, the actions of the Appellate Courts of the state of Georgia are a crime under OCGA 16-10-1 & 16-10-20:

Title 16, Chapter 10, Section 1 (16-10-1)

Any public officer who willfully and intentionally ***violates the terms of his oath as prescribed by law*** *shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years.*

Title 16, Chapter 10, Section 20 (16-10-20)

*A person who knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact; **makes a false, fictitious, or fraudulent statement** or representation; or **makes or uses any false writing or document, knowing the same to contain any false, fictitious, or fraudulent statement** or entry, in any matter within the jurisdiction of any **department or agency of state government** or of the government of any county, city, or other political subdivision of this state shall, upon conviction thereof, be punished by a fine of not more than $1,000.00 or by imprisonment for not less than one nor more than five years, or both.*

"We just made it up as we went along" also qualifies for being a RICO conspiracy via Theft by Taking, Theft by Deception and federal Mail Fraud. It also violates Plaintiff/Petitioner's civil rights under 42 USC 1983.

"Appellee City of Roswell argues that under Georgia law a municipality is immune from liability for failure to perform or errors in performing a governmental function. Of course it is a federal right of action asserted here, and it is controlled by federal law. The supremacy clause of the Constitution prevents us from construing the federal rule to permit a state immunity defense.

"In order to state a claim under 42 USCA 1983 the plaintiff must allege that the defendant is a person who **deprived him of a constitutional right while acting under color of state law or custom.** See Smith v. YMCA of Montgomery, 462 F2d 634 (5th Cir. 1972). Municipalities are among the 'persons' to whom 1983 may apply, Monell v. Dept. of Social Services, 436 U. S. 658 (98 SC 2018, 56 LE2d 611) (1978). 'By including municipalities within the class of "persons" subject to liability for violations of the Federal Constitution and laws, Congress -- the supreme sovereign on matters of federal law -- abolished whatever vestige of the State's sovereign immunity the municipality possessed.' Owen v. City of Independence, 445 U. S. 622, 647 (100 SC 1398, 63 LE2d 673) (1980).

"The City of Roswell proposes that Davis seeks to impose liability upon it based upon either Roswell's negligent operation of its police department or a respondeat superior theory and argues that neither ground will support appellant's claim. We agree that neither Monell nor Owen permit a municipality to be held liable under 42 USCA 1983 solely on negligence or respondeat superior theories. Nevertheless, if appellant is able to prove that Officer Ramey **deprived him of federally guaranteed**

rights while acting in the 'execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy,' Monell v. Dept. of Social Services, 436 U. S. 658, 694, supra, he will succeed in his action and liability may be imposed on the City of Roswell." **DAVIS et al. v. CITY OF ROSWELL et al., 38495 (250 Ga. 8) (295 SE2d 317) (1982).**

"We interpret 42 USCA 1983 to create a cause of action, cognizable by the courts of this state, **based upon acts which are in implementation of an intentional policy, adopted or ratified by the governing body of a public agency, which acts work deprivation of a constitutional right. Such a policy may be formal or informal, acknowledged or vigorously denied, persistent or intermittent, or implemented by but one single act.** What is required to be proved, directly or circumstantially, is that **a governing body has worked constitutional deprivation of a citizen pursuant to an impermissible or corrupt policy which is intentional and deliberate." CITY OF CAVE SPRING v. MASON et al., 40155 (252 Ga. 3) (310 SE2d 892) (1984).**

Justice Smith however vigorously dissents from the **"deliberate"** aspect of the holding in *City of Cave Spring*:

"The majority, unable to garner the votes necessary to overrule our decision in Davis v. City of Roswell, 250 Ga. 8 (295 SE2d 317) 1982), instead attempts to obfuscate the clear import of what we said there. I believe that the majority's strained construction of Davis, a decision on which the printer's ink has barely dried, is unnecessary and confusing and I therefore dissent.

"Before proceeding to my grounds for disagreement with the majority opinion, I would like to emphasize several points on which the members of this court, by virtue of the Davis decision, must agree. First, we recognize that a claim of deprivation of constitutionally guaranteed rights brought under 42 USCA 1983 is cognizable in state courts. Davis v. City of Roswell, supra. Second, to the extent that under 42 USCA 1983 a municipality may be liable for the misdeeds of its employees who are acting in the execution of a governmental policy or custom, see Monell v. Dept. of Social Services, 436 U. S. 658, 694 (98 SC 2018, 56 LE2d 611) (1978), the traditional state constitutional and statutory defense of sovereign immunity is no longer available to a municipal defendant. This we made perfectly clear in Davis: 'Of course it is a federal right of action asserted here, and it is controlled by federal law. The supremacy clause of the Constitution prevents us from construing the federal rule to permit a state immunity defense.' Id. at 9. See also Owen v. City of Independence, 445 U. S. 622, 647 (100 SC 1398, 63 LE2d 673) (1980); Fitzpatrick v.

Bitzer, 427 U. S. 445, 456 (96 SC 2666, 49 LE2d 614) (1976). Third, we all agree that recovery under 42 USCA 1983 is not premised on respondeat superior or negligence, but on an injury caused by a government policy or custom which violates federally protected rights. Again, my opinion in Davis made this clear: 'We agree that neither Monell nor Owen permit a municipality to be held liable under 42 USCA 1983 solely on negligence or respondeat superior theories. Nevertheless, if appellant is able to prove that Officer Ramey deprived him of federally guaranteed rights while acting in the "execution of a government's policy or custom, whether made by its lawmakers or by **those whose edicts or acts may fairly be said to represent official policy,**" Monell, [supra], he will succeed in his action and liability may be imposed on the City of Roswell.' Id. at 9.

"Having traced our considerable common ground, I turn now to the source of disagreement between myself and the majority in this case: What constitutes a governmental 'policy or custom,' which will enable a 42 USCA 1983 claimant to resist a municipal defendant's motion for summary judgment. Under our Civil Practice Act, summary judgment must be denied unless it is affirmatively shown that the claimant would not be entitled to relief under any set of facts which could be proven at trial. See OCGA 9-11-56 (Code Ann. 81A-156); Frady v. Irvin, 245 Ga. 307 (5) (264 SE2d 866) (1980). Here Mason alleged that the mayor of Cave Spring directed the chief of police to arrest him without probable cause or a warrant. **Whether these actions constituted the execution of a government policy or custom which would subject the city to a 42 USCA 1983 damages claim was necessarily a factual question for the jury's determination.** See Larson v. Wind, 536 F Supp. 108 (N. D. Ill. 1982). There is no question here but that the mayor and police chief of Cave Spring are among those who may fairly be said to formulate and carry out the municipality's policy. The purpose of 42 USCA 1983 is to redress **'[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law,'** United States v. Classic, 313 U. S. 299, 326 (61 SC 1031, 85 LE 1368) (1941).

"Today's majority opinion disregards these recognized principles, instead fashioning a standard which is more confusing than helpful. 'We interpret 42 USCA 1983 to create a cause of action, cognizable by the courts of this state, based upon acts which are in implementation of an intentional policy, adopted or ratified by the governing body of a public agency . . .' Majority opinion at p. 4. **To the contrary, no such standard has ever been promulgated or approved by the United States**

Supreme Court, and the federal judiciary has settled on the view that unintentional conduct and failure to perform a duty can provide grounds for a 1983 claim. In Rizzo v. Goode, 423 U. S. 362 (96 SC 598, 46 LE2d 561) (1976) and its progeny, it has been established that **implicit authorization or acquiescence in constitutional misconduct by supervisory officials is actionable.** This doctrine was refined in Estelle v. Gamble, 429 U. S. 97 (97 SC 285, 50 LE2d 251) (1976), where the Court said that the plaintiff must show (at least in the context of the Eighth Amendment) **'deliberate indifference'** to a probable constitutional violation. Estelle's 'deliberate indifference' and Rizzo's 'authorization or acquiescence' standards are also satisfied when a supervisory official fails to act or acts incompletely to remedy the harm 'when he had actual or imputed knowledge of a past pattern of police misconduct or knowledge of well-known, isolated incidents of police misconduct. See Parker v. McKeithen, 488 F2d 553 (5th Cir.), cert. denied, 419 U. S. 838 (95 SC 67, 42 LE2d 65) (1974); Sims v. Adams, 537 F2d 829, 831-32 (5th Cir. 1976).' Leite v. City of Providence, 463 FSupp. 585 (D. R. I. 1978) (emphasis supplied).

"There is clearly no requirement in these cases that conduct violative of the Constitution be either intentional or formally adopted by the governing body of a public agency. Perry v. Elrod, 436 F Supp. 299 (N. D. Ill. 1977) (implied acquiescence sufficient for 1983 liability). In my view the majority opinion misapprehends the basis for 1983 liability. No formula for misconduct need be shown by the claimant, and no willfulness or specific intent to deprive him or others of protected rights is required. A reckless disregard or indifference to violation of these rights, which need not amount to implementation of an intentional policy, is sufficient. See Monroe v. Pape, 365 U. S. 167, 187 (81 SC 473, 5 LE2d 492) (1961).

"Because I strongly disagree with the majority opinion, which ignores pertinent cases construing 42 USCA 1983 as well as this court's opinion in Davis v. City of Roswell and because I think that the Court of Appeals and the trial court correctly applied the controlling law, I would affirm." **CITY OF CAVE SPRING v. MASON et al., 40155 (252 Ga. 3) (310 SE2d 892) (1984).**

The deliberate actions of the Court of Appeals in the instant case were a more than clear violation of Plaintiff/Petitioner's rights to Due Process and Equal Protection under the 14th Amendment to the U.S. Constitution.

D. Question #2

Did the trial court and the Court of Appeals of Georgia violate Plaintiff/Petitioner's right to 14th Amendment Due Process and/or Equal Protection of the laws, in their rulings on the re-cusals of the trial level judges Tice and Bailey.

The issues of the re-cusals of Judges Tice and Bailey were first raised by motion in the trial court based on state law thus bringing those issues under the protection of the 14th Amendment. Plaintiff/Petitioner also raised the issue of Unequal Protection under the 14th Amendment of the United States Constitution in the subsequent hearing. (MT P. 15, L. 7, 06/20/06).

The controlling case on this issue is **Mendenhall v. Hopper, 453 F. Supp. 977, 984 (S.D. Ga. 1978), aff'd, 591 F.2d 1342 (5th Cir. 1979).** The burden of proof in Georgia is still exactly the same as it was in *Mendenhall*: "...a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned."

"These cases implicitly support the view that failure by a judge to disqualify himself which serves to deprive the defendant of an unbiased trier of fact is a denial of due process. See United States v. Denno, 313 F.2d 364, 374 (2nd Cir.), cert. den. 372 U.S. 978, 83 S.Ct. 1112, 10 L.Ed.2d 143." **Mendenhall v. Hopper, 453 F. Supp. 977, 984 (S.D. Ga. 1978), aff'd, 591 F.2d 1342 (5th Cir. 1979).**

Mendenhall is predicated on earlier state cases such as *Savage v. Savage* that contain even stronger language:

"This was the state of the law until January 1, 1974, when the Georgia Code of Judicial Conduct became effective. See, 231 Ga., page A-1. Under Canon 3 C.(1) (a) of that Code, a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where he has a personal bias or prejudice concerning a party. **We interpret the word 'should' to mean 'shall'** in the context of this requirement. Consequently, where bias or prejudice of a judge has been shown concerning a party, it is error for the judge to hear and decide the case." **SAVAGE v. SAVAGE (two cases) 29998, 30109 (234 Ga. 853) (218 SE2d 568) (1975).**

In response to Plaintiff/Petitioner's Motion to Recuse with supporting affidavit, defendant's submitted no affidavits or sworn testimony of any kind. In the recusal hearing itself, defendant's alternate counsel, who had not even been present at the prior hearing to witness

Judge Tice's demeanor, was allowed to argue that no such contemptuous and disdainful demeanor had in fact existed. Plaintiff/Petitioner objected and stated that his objection was predicated on Unequal Protection under the 14th Amendment of the United States Constitution. (MT P. 15, L. 7, 06/20/06). The inherent principle is that counsel may never in oral argument point to any "facts" other than those that have been introduced into evidence. Since Defendant had submitted no evidence of any kind to rebut Plaintiff/Petitioner's affidavit, their argument should have been stricken from the record upon Plaintiff/Petitioner's objection.

It was a very plain and simple principle.

Motion and affidavit Judge Tice (App., infra, 12a & 14a). Motion and affidavit Judge Bailey (App., infra, 20a & 22a).

E. Other Relief

Plaintiff/Petitioner also prays for such other and further relief as may be due and granted under the rules of this court and the laws of the United States.

REASONS FOR GRANTING THE PETITION

The issue of the violation of 14th Amendment citizen rights by courts engaging in judicial activism is of a recurrent, expanding nature and of great practical and humanitarian importance to this Plaintiff/Petitioner, the people of the state of Georgia and the citizens of these United States.

An opinion on the merits of the instant case may allow this court to issue important mandates on Strict Construction as it relates to 14th Amendment guarantees to Due Process and Equal Protection.

The decision below is simply incorrect and most appalling of all is a study in intentional and deliberate criminal trespass on the rights of others.

CONCLUSION

The Petition for a writ of certiorari should be granted.

On a more personal note, I am disabled, I drive a 22 year old Chrysler and the imposition of $4300 in attorney's fees and costs may result in bankruptcy, homelessness and/or death. I will have suffered this fate for having believed in the Constitution and rule of law. I am familiar with the State Farm, the B.M.W. cases, millions of dollars in punitive damages. I'm aware that money makes the ball game, and others often don't get to swing the bat.

But for once, could we do one for plain language, for strict construction, for the little guy: for rule of law.

Respectfully submitted,

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Hull GA. 30646
706.788.3158
Pro se
Counsel of Record

Counsel for Petitioner

September 2007

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In the Supreme Court of Georgia

Decided: MAR 2 7 2006
(Stamped)

S06A0497. KIRKLAND v. KIRKLAND

PER CURIAM.

The judgment of the court below is affirmed without opinion pursuant to Supreme Court Rule 59.

Affirmed without opinion. All the Justices concur.

IN THE SUPERIOR COURT OF FRANKLIN COUNTY
STATE OF GEORGIA

DWAIN LEE KIRKLAND,)
Plaintiff,)

vs. CIVIL ACTION NO.: 05-FV-828-T

CHRISTOPHER K. TAMPLIN AND)
KELLY TAMPLIN AND OTHERS,)
Defendants.)

DEFENDANTS' MOTION TO DISMISS

NOW COME DEFENDANTS CHRISTOPHER K. TAMPLIN AND KELLY TAMPLIN and hereby move that the Court dismiss this action pursuant to O.C.G.A. § 9-2-5 on the basis that a prior case was pending in the Superior Court of Madison County, Georgia, which contained the same cause of action and against the same parties. In support of this Motion, Defendants submit the following Brief containing Argument and Citation of Authority.

ARGUMENT AND CITATION OF AUTHORITY

O.C.G.A. § 9-2-5(a) provides that "[n]o plaintiff may prosecute two actions in the courts at the same time for the same cause of action and against the same party. ... If two such actions are commenced at different times, the pendency of the former shall be a good defense to the latter." Plaintiff filed the above styled action before this Court at 2:07 pm on November 14, 2005. See Certified Copy of Complaint in Franklin County Superior Court attached hereto as Exhibit A.[1] Plaintiff also filed an action which stated the same causes of action against the same parties as the Franklin County action in Madison County Superior Court at 12:53 pm on November 14, 2005, prior to the Franklin County action. See Certified Copy of Complaint in

Madison County Superior Court attached hereto as Exhibit B.[2] Plaintiff has now commenced and

continues to maintain identical actions in two counties. Under O.C.G.A. § 9-2-5, a prior pending case which is identical in cause of action and parties is a complete defense to a later filed action. Because Plaintiffs case in Madison County Superior Court preceded the above styled action in Franklin County, this action should be dismissed. Even if Plaintiff voluntarily dismisses his action now pending in Madison County Superior Court, the dismissal of the case before this Court is proper. As Georgia Courts have ruled, "[t]he effect of the defense cannot be avoided even by a dismissal of the first suit." Minniefield v. Svlvester, 193 Ga. App. 484 (1989). Because Plaintiff made his choice of venue at the time he selected Madison County, Georgia as the site of his initial lawsuit, the Plaintiff may not maintain an action in Franklin County and this action should be dismissed.

BLASINGAME, BURCH, GARRARD,
& ASHLEY, P.C.

(Signed)
BY: _____
THOMAS H. ROGERS, JR.
Georgia bar No. 613437

(Signed)
BY: _____
THOMAS F. HOLLINGSWORTH III
Georgia Bar No. 140858

P. O. Box 832
440 College Avenue North
Athens GA 30603
(706) 354-4000

[1, 2:] The time of the filing of the two complaints was never contested between the parties. The certified copies of the complaints, Exhibit's A & B, have been omitted for brevity.

(Certificate of Service omitted for brevity. Defendant's motion was served on Plaintiff on March 22nd, 2006. Certificates of Service have been omitted in all following documents for purposes of brevity.)

IN THE SUPERIOR COURT OF FRANKLIN COUNTY
STATE OF GEORGIA

Dwain Lee Kirkland,	)	
Plaintiff	)	*(Time stamped: 2006 APR 20 PM 3:12)*
v.	)	
	)	
	)	**Civil Action**
Kelly Tamplin	)	**File No. 05-FV-828-T**
And Others,	)	
Defendants.	)	

ANSWER

To: Defendant's Motion to Dismiss

Comes now Plaintiff Dwain Lee Kirkland and answers and responds to Defendant's Motion to Dismiss dated 03/22/2006.

1.

Defendant's Motion to Dismiss was not timely filed under O.C.G.A. 9-11-12 (b)(6).

2.

The two identical complaints contained in Defendant's Motion to Dismiss and marked as "Exhibit A" and "Exhibit B" were "commenced simultaneously" under O.C.G.A. 9-2-5 (a). The Plaintiff has already under O.C.G.A. 9-2-5 (a) elected "...which (case) he will prosecute."

3.

Defendant's Motion to Dismiss itself is not valid, and none of the assertions regarding the law within it are valid.

In support of this Answer, Plaintiff files herewith his Affidavit and Brief containing Citations of Authority and Argument.

Wherefore, Plaintiff prays Defendant's Motion to Dismiss be denied, that Defendant receive no relief of any kind whatsoever, and that Plaintiff receive such other and further relief as may be granted under the law.

(Signed)

_____

Dwain Lee Kirkland, Pro se

(04/20/06)

_____

Date

P.O.B. 773
Hull, Ga. 30646
706-788-3158

IN THE SUPERIOR COURT OF FRANKLIN COUNTY
STATE OF GEORGIA

Dwain Lee Kirkland,	)	
Plaintiff	)	*(Time stamped: 2006 APR 20 PM 3:12)*
v.	)	
	)	
	)	**Civil Action**
Kelly Tamplin	)	**File No. 05-FV-828-T**
And Others,	)	
Defendants.	)	

Comes now Plaintiff Dwain Lee Kirkland and files with the court his affidavit in support of his Answer to Defendant's Motion to Dismiss dated March 22nd, 2006 in the above-styled action.

AFFIDAVIT OF DWAIN LEE KIRKLAND

1. I, Dwain Lee Kirkland, do hereby depose and swear on my oath that all of the following is true and correct to the best of my knowledge and belief at this time:

2. My name is Dwain Lee Kirkland; I am over the age of 18, suffer from no legal disability, and am otherwise competent to testify.

3. That I, Dwain Lee Kirkland, filed two identical complaints in Madison and Franklin counties against the Defendants Christopher K. and Kelly Tamplin on November 14th, 2005 at 12:53 P.M. and 2:07 P.M. respectively. I did this because I thought that they, legally speaking, resided in two different counties. My intention was to dismiss one of the complaints if they both resided in the same county. I also intended, if they resided in different counties, legally speaking, to amend each of the complaints, so that it would not include the defendant that did not reside in that county. The complaints were identical, were both prepared in advance of the day of filing, and were filed 74 minutes apart: the time it takes to drive from the Madison County courthouse to the Franklin County courthouse. This is as close in time as is humanly possible and is considered to be "commenced simultaneously" under the law.

I then propounded discovery to the Defendants to find out what counties they legally resided in. I was able, before they responded, to found out that Christopher K. Tamplin was registered to vote in Madison

County and that Kelly Tamplin has a Homestead Exemption in Franklin County. I amended the complaints at that time to drop Kelly Tamplin from the Madison County complaint and Christopher K. Tamplin from the Franklin County complaint. When I did receive the response from the Interrogatories and Production of Documents, it did show, for all questions asked and documents provided, that Christopher K. Tamplin did reside legally in Madison County and Kelly Tamplin did reside legally in Franklin County.

I filed the complaints simultaneously. I then decided which county was the proper venue for each of the Defendants. I then amended the complaints according to which court had jurisdiction over which Defendant.

I did the transactions above, perfectly, according to my knowledge of O.C.G.A. 9-2-5 (a) and pertinent case law.

(Signed)

_____

By Dwain Lee Kirkland

(04/20/06)

_____

Date

Notary: Laurel E. Bridges (Signed, embossed seal.)
Notary Public, Madison County Georgia
My Commission expires Jan. 15, 2007

IN THE SUPERIOR COURT OF FRANKLIN COUNTY
STATE OF GEORGIA

Dwain Lee Kirkland,	)	
Plaintiff	)	*(Time stamped: 2006 APR 20 PM 3:12)*
v.	)	
	)	
	)	**Civil Action**
Kelly Tamplin	)	**File No. 05-FV-828-T**
And Others,	)	
Defendants.	)	

Brief

In: Support of Answer to Defendant's Motion to Dismiss dated March 22nd, 2006.

Citations of Authority

1. O.C.G.A. 9-11-12(b)(6): "Failure to state a claim upon which relief can be granted." Regarding 9-11-12 (b)(6): "A motion making any of these defenses shall be made before or at the time of pleading."

2. O.C.G.A. 9-2-5. Prosecution of two simultaneous actions:

9-2-5. Prosecution of two simultaneous actions for same cause against same party prohibited; election; pendency of former action as defense; exception.

(a) No plaintiff may prosecute two actions in the courts at the same time for the same cause of action and against the same party. If two such actions are commenced simultaneously, the defendant may require the plaintiff to elect which he will prosecute. If two such actions are commenced at different times, the pendency of the former shall be a good defense to the latter.

3. Clark v. Weaver, 159 Ga. App. 594:

Where actions are commenced at different times, plaintiff has no

election, and must proceed with the initially filed action, and such former action shall be a good defense to the latter. If, however, the actions are filed simultaneously none of the actions is either "former" or "latter," and the plaintiff must select the case he will pursue and the others must be dismissed. This section allows the plaintiff to elect the case which he will prosecute and not the one which he will first prosecute. **Clark v. Weaver. 159 Ga. App. 594, 284 S.E.2d 95 (1981).**

4. Moore v. Lamar, 182 Ga. App. (at page 710):

Not only does UCGA § 9-2-5 (a) require two pending actions for the same cause of action, it also requires that both pending actions be "against the same party."

ARGUMENT

Defendant's assertions under O.C.G.A. 9-2-5 actually fall under O.C.G.A. 9-11-12 (b)(6), since "Prior Pending" falls under "Failure to state a claim upon which relief can be granted." As related in Citation of Authority #1 above, "A motion making any of these defenses shall be made before or at the time of pleading." According to the law, a motion to dismiss on these grounds should have been made either before or at the time of the Responsive Pleading to Plaintiff's Complaint and not in March 2006, 4 months later. As such, a motion to dismiss at this time is not timely filed and merely frivolous.

Defendant in his motion to dismiss has completely omitted the second sentence of O.C.G.A. 9-2-5, see Citation of Authority #2 above, which states: "If two such actions are commenced simultaneously, the defendant may require plaintiff to elect which he will prosecute." The actions according to the Plaintiff's affidavit filed herewith were "commenced simultaneously" and the plaintiff has also according to his affidavit elected "which he will prosecute" by amending the complaints to omit the defendant who was not under the jurisdiction of the court.

See Citation of Authority #3 above: "If, however, the actions are filed simultaneously none of the actions is either 'former' or 'latter' and the

plaintiff must select the case he will pursue and the others must be dismissed." This is precisely what was done in the above-styled action.

See Citation of Authority #4 above: "Not only does OCGA 9-2-5 (a) require two pending actions for the same cause of action, it also requires that both pending actions be 'against the same party'." There are now and have been, since February 28th, 2006, when the complaints in Madison and Franklin counties were amended, two identical complaints in two different counties against two different parties. The transactions in both cases in both counties were done precisely by the law and totally completed a full 22 days before Defendant filed his Motion to Dismiss.

In summation, O.C.G.A. 9-2-5 (a) was completely adhered to at all times and none of Defendant's assertions as regards it are valid on this case.

(Signed)

_____

Dwain Lee Kirkland, Pro se

(04/20/06)

_____

Date

P.O.B. 773
Hull, Ga. 30646
706-788-3158

IN THE SUPERIOR COURT OF FRANKLIN COUNTY
STATE OF GEORGIA

Dwain Lee Kirkland,	)	
Plaintiff	)	*(Time stamped: 2006 MAY - 1 PM 3:58)*
v.	)	
	)	
	)	**Civil Action**
Kelly Tamplin	)	**File No. 05-FV-828-T**
And Others,	)	
Defendants.	)	

MOTION

To: Recuse

Dwain Lee Kirkland, Pro se

Moves:

1.

That a personal and/or professional bias and/or prejudice exists with Judge Lindsay A. Tice, Jr. against Plaintiff Dwain Lee Kirkland in the above-styled case. See attached Affidavit.

2.

That Judge Tice may, I believe, according to Georgia Law recuse himself on his own recognizance having acknowledged if only to himself the existence of a bias or prejudice in favor of or against a party in the above-styled case.

3.

That due to Item #'s 1 and 2 above, Judge Tice should recuse himself or be recused from this, the above styled case, so that manifest injustice does not result.

PRAYS:

That an order do issue recusing Judge Tice from the above-styled case.

That the Plaintiff receive other and further relief as may be due and

granted under the law.

(Signed)

_____

Dwain Lee Kirkland, Pro se

(04/28/06)

_____

Date

P.O.B. 773
Hull, Ga. 30646
706.788.3158

IN THE SUPERIOR COURT OF FRANKLIN COUNTY
STATE OF GEORGIA

Dwain Lee Kirkland,	)	
Plaintiff	)	
v.	)	
	)	
	)	**Civil Action**
Kelly Tamplin	)	**File No. 05-FV-828-T**
And Others,	)	
Defendants.	)	

Comes now Plaintiff Dwain Lee Kirkland and files with the court his affidavit in support of the Motion to Recuse in the above-styled action.

AFFIDAVIT OF DWAIN LEE KIRKLAND

1. I, Dwain Lee Kirkland, do hereby depose and swear on my oath that all of the following is true and correct to the best of my knowledge and belief at this time:

2. My name is Dwain Lee Kirkland; I am over the age of 18, suffer from no legal disability, and am otherwise competent to testify.

3. My first indication of bias and/or prejudice in the hearing of April 26th, 2006 was Judge Lindsay Tice indicating to Mr. Hollingsworth that he had read my Answer to Defendant's Motion to Dismiss. Judge Tice's tone towards this answer was one of disdain and contempt.

5. The animosity of Item #3 above carried throughout the hearing and was mainly conducted by tone of voice and facial expression. As such, it may not be apparent in the transcript of hearing. In front of a gallery of witnesses this was a very embarrassing situation. I have twice been treated this way in front of a Northern Judicial Circuit Judge. I was also subjected to this type of treatment in front of Judge Thomas Hodges in a hearing on July 15th, 2005. There were however no witnesses present at that time except court personnel. The bias in Judge Hodge's case apparently stemmed from his extreme dislike of having parties Pro se involved in complex litigation in his courtroom. The same would appear to apply to Judge Tice except to a far greater degree. I had even anticipated this type of prejudice and opened my argument by saying that I was looking for an

attorney to take over the case. And it was and is true. I do not imagine that with this type of prejudice that I could ever win a case or hearing of any kind, especially in front of Judge Tice. There also exists a possibility that both Judge Hodges and Judge Tice have been subjected to violations of Judicial Canon which basically consists of talking with lawyers and among judges about various cases and their litigants. I have apparently encountered this with 2 out of 4 judges in Madison County and the Northern Judicial Circuit. I have no evidence that Judge Hodges and Judge Tice have not been involved in this as well. I feel that both brought bias and/or prejudice with them to the courtroom on my first hearing before them. I am not used to this. I have been very successful bringing items before various courts and tribunals in large metropolitan areas in the past and have never encountered this type of behavior before. It seems to me to amount to scorn for my constitutional rights as an individual.

8. Having noted the animosity towards my cause as I stated above, I then said something in my own argument about having discussions with Mr. Hollingsworth, opposing counsel, about joining the Defendants in Madison County. (This was at Mr. Hollingsworth's request, in the hallway, just prior to the hearing.) It was to no avail. Judge Tice indicated he would likely make that decision for me. He expressed in his behavior that he basically was not listening to the argument and that I could have stopped it right at that moment. I did ask that I be allowed to finish the argument anyway, for purposes mostly of appeal as I believe my argument was lost before I ever entered the courtroom.

9. I believe Judge Tice also made mention of the merits of the case in general during the course of Mr. Hollingsworth's argument. I took from his tone and demeanor that he would immediately dismiss the entire case on its merits as well. Having seen no affidavits nor heard any testimony I believe this demonstrates a profound bias and/or prejudice against my case.

10. I believe the animosity as outlined in Item #'s 3 to 9 above ultimately manifested itself in a biased ruling from the bench. It was obvious to me almost from the outset that this would be the case. The ruling certainly appears to be to be groundless in law and in fact, and will most likely be the subject of an appeal.

11. I would also ask respectfully that Judge Tice recuse himself voluntarily as this would seem the shortest route to a fair and equitable

trial on the merits of the above-styled case.

(Signed)

_____

By Dwain Lee Kirkland

(04/28/06)

_____

Date

Laurel E. Bridges (Signed, embossed seal.)

Notary: _____

My commission expires:

Stamp: Notary Public, Madison County Georgia
My Commission expires Jan. 15, 2007

IN THE SUPERIOR COURT OF FRANKLIN COUNTY
STATE OF GEORGIA

DWAIN LEE KIRKLAND,)
Plaintiff,)

(Time stamped)
(2006 MAY - 2 AM 8:33)

vs. CIVIL ACTION NO.: 05-FV-828-T

CHRISTOPHER K. TAMPLIN AND)
KELLY TAMPLIN AND OTHERS,)
Defendants.)

ORDER

The Defendants' Motion to Dismiss having come before this Court, and having reviewed the parties' briefs and all matters of record in this action, and having heard oral argument from counsel for Defendants and from Plaintiff, pro se;

This Court hereby finds that Plaintiff's Complaint filed at 12:53 pm on November 14, 2005, in the Superior Court of Madison County Georgia and bearing the Civil Action File number of 05-MV-977-H was filed prior to the above styled action which was filed at 2:07 pm on November 14, 2005, and that the two cases were not filed simultaneously.

This Court further finds that Plaintiff's Complaint in the above styled action and Plaintiffs Complaint in the Superior Court of Madison County Georgia, bearing the Civil Action File number of 05-MV-977-H, assert the same causes of action against the same defendants.

- 1 -

WHEREFORE, IT IS HEREBY ORDERED that pursuant to O.C.G.A. § 9-2-5(a) the above styled action is hereby dismissed without prejudice.

ODERED this 28th day of April, 2006 (Signed)

The Honorable Lindsay A. Tice, Jr.
Judge
Superior Court of Franklin County
State of Georgia

IN THE SUPERIOR COURT OF FRANKLIN COUNTY
STATE OF GEORGIA

DWAIN LEE KIRKLAND	*	
	*	
VS.	*	
	*	**CASE # 05-FV-828-T**
	*	
CHRISTOPHER K. TAMPLIN and	*	
KELLY TAMPLIN and OTHERS	*	

MOTION TO DISMISS

The order, in the above styled case, filed May 2, 2006 is hereby withdrawn due to a prior Motion of Recusal filed May 1, 2006, at 3:58 PM.

IT IS SO ORDERED:
This 2nd day of May, 2006.

(Signed)

_____

LINDSAY A. TICE, JR.
JUDGE, SUPERIOR COURTS
NORTHERN JUDICIAL CIRCUIT

IN THE SUPERIOR COURT OF FRANKLIN COUNTY
STATE OF GEORGIA

DWAIN LEE KIRKLAND,	)	
Plaintiff,	)	*(Time stamp:*
	)	*2006 AUG 14 AM 8:35)*
Vs.	)	
	)	Civil Action No. 05-FV-828-T
CHRISTOPHER K. TAMPLIN,	)	
KELLY TAMPLIN	)	
	)	
Defendants.	)	

ORDER ON MOTION TO RECUSE

The above referenced matter came before this Court on a Motion to Recuse on June 20, 2006. The Plaintiff was pro se, and Defendant's were represented by Thomas H. Rogers. After hearing all the arguments, testimony of parties and considering the relevant law, the Court finds as follows:

The Motion to Recuse is hereby **DENIED.**

SO ORDERED THIS 2 DAY of AUGUST, 2006.

(Signed)

_____

JOHN H. BAILEY JR.
SUPERIOR COURT JUDGE
NORTHERN JUDICIAL CIRCUIT

IN THE SUPERIOR COURT OF FRANKLIN COUNTY
STATE OF GEORGIA

Dwain Lee Kirkland,	)	
Plaintiff	)	*(Time stamped: 2006 SEP 19 PM 3:59)*
v.	)	
	)	
	)	**Civil Action**
Kelly Tamplin	)	**File No. 05-FV-828-T**
And Others,	)	
Defendants.	)	

MOTION

To: Recuse

Dwain Lee Kirkland, Pro se

Moves:

1.

That a personal and/or professional bias exists with Judge John Bailey in favor of the law firm of Blasingame, Burch, Garrard and Ashley of Athens, Georgia in the above-styled case. That Judge John Bailey is biased in favor of the other Judges of the Northern Judicial circuit as well. See attached affidavit.

2.

That the bias of Item #1 above has existed with all the judges encountered by the Plaintiff in the Northern Judicial Circuit. The Probate Court Judge of Madison County appears to biased in favor of lawyers as well. That the Judges of the Northern Judicial Circuit are biased in favor of each other as well as in favor of lawyers and particular law firms. See attached affidavit.

3.

That the bias of Item #'s 1 and 2 above has been expressed by demeanor, actions and consistent abuses of discretion in the rulings of the various courts. See attached affidavit.

4.

That the ruling of Judge John Bailey--signed on or about August 2nd, 2006

and filed with the Franklin County Clerk of Court on or about August 14th, 2006, a copy of which the Plaintiff still has not received--denying the recusal of Judge Lindsay Tice is an abuse of discretion based on the bias of Item #'s 1 to 3 above. See attached affidavit.

5.

That due to Item #'s 1 to 4 above, Judge John Bailey should recuse himself from this, the above-styled action, so that manifest injustice as well as a violation of Plaintiff's right to Due Process under the 5th and the 14th amendments to the U.S. Constitution does not result.

6.

That Judge Bailey may according to Georgia Law recuse himself on his own motion having acknowledged, if only to himself, the existence of a bias in favor of a party in the above-styled case.

7.

That due to Item #'s 1 to 6 above, Judge Bailey should recuse himself or be recused from this, the above styled case, so that that manifest injustice as well as a violation of Plaintiff's right to Due Process under the 5th and the 14th amendments to the U.S. Constitution does not result.

PRAYS:

That an order do issue recusing Judge Bailey from the above-styled case.

That the Plaintiff receive other and further relief as may be due and granted under the law.

(Signed)

_____

Dwain Lee Kirkland, Pro se

(09/19/06)

Date

P.O.B. 773
Hull, Ga.
706.788.3158

IN THE SUPERIOR COURT OF FRANKLIN COUNTY
STATE OF GEORGIA

Dwain Lee Kirkland,	)	
Plaintiff	)	*(Time stamped: 2006 SEP 19 PM 3:59)*
v.	)	
	)	**Civil Action**
Kelly Tamplin	)	**File No. 05-FV-828-T**
And Others,	)	
Defendants.	)	

AFFIDAVIT OF DWAIN LEE KIRKLAND

1. I, Dwain Lee Kirkland, do hereby depose and swear on my oath that all of the following is true and correct to the best of my knowledge and belief at this time:

2. My name is Dwain Lee Kirkland; I am over the age of 18, suffer from no legal disability, and am otherwise competent to testify.

3. My first encounter with bias was in the May 12th, 2004 hearing before Judge Royston of the Madison County Probate Court. In a change from his normal demeanor, he seemed to be hammering on me particularly hard for the benefit of the lawyer opposing me.

4. I next encountered bias in a July 15th, 2005 hearing before Judge Hodges. He immediately treated me with contempt and questioned the fact that I had appealed Judge Royston's order from the Probate Court. The contempt continued throughout the hearing with a deputy actually laughing at me at one point. I lost 2 out of 3 discovery issues in that hearing. I believe some of these were abuses of discretion. No one, including the Georgia Supreme Court, has issued me a written opinion as to why I did not win these.

5. In a subsequent hearing before Judge Hodges on September 21st, 2005, I lost case #04-MV-968-H of Item #'s 3 and 4 above on Summary Judgment. This is in spite of the fact that opposing counsel had, and filed, no evidence of their own on the case other than 4 affidavits that I rebutted count for count with an affidavit of my own. I also had 2 depositions filed on the case as part of the evidence. The seals were not even broken on these at the time of the appeal, which was of course after the Summary Judgment had been handed down.

6. I went before Judge Lindsay Tice in a May 16th, 2006 hearing and was treated with contempt and disdain. I did not even think that I would be allowed to finish my argument. An immediate bench ruling was issued. I believe it was an abuse of discretion.

7. I have had 2 hearings in 2006 in front of Judge Bailey. The first was a recusal of Judge Tice. In that hearing I thought he appeared to be very interested in the case but was perhaps a bit too friendly, possibly trying to impress upon me that he was not biased due to his demeanor. His demeanor was changed to perfectly flat in the hearing of September 13th, 2006 which is the subject of this recusal. He also did not ask a single question as he had done in the earlier hearing. He did however off the record after the hearing ask Mr. Hollingsworth where opposing counsel "Tom Rogers" was. It was like they were the best of buddies. There was no conversation with me of any kind. I believe that anyone who witnessed this would have felt that it was inappropriate and that there was a bias. This was not his demeanor at all in the first hearing. I actually thought that he and "Tom Rogers" might have had a problem between them at some time. I do not know how to reconcile a complete about face such as this, other than the way he was acting in the first hearing was not at all the way he felt.

In the most recent hearing on September 13th, 2006, Judge Bailey indicated he would issue a order and mentioned something about a week. The order was actually filed that day at lunch time. It looks awfully peculiar. Had I not anticipated something like this, I might have failed to check my post office box and would have been unable to file a recusal within the five day deadline.

I believe the ruling was just another of many abuses of discretion. The only level of proof that had to be met on the recusal of Judge Hodges was that his "impartiality might reasonably be questioned." That is a very low threshold of proof. I believe his demeanor alone in the hearing of July 15th, 2005 met that level of proof.

8. All the behavior of Item #'s 3 to 7 above appears to be driven by a bias known as "The Good Ol' Boy Network." Judge Hodges backs Judge Royston, Judge Bailey backs Judge Hodges, they all appear to cater to local lawyers. Judge Hodges, Tice and Bailey appear to particularly cater to Blasingame, Burch, Garrard and Ashley. Judge Bailey also backs Judge Tice. It's a no win situation. In any case or any hearing tried in the Northern Judicial Circuit by any of its judges, it is my sincerest believe

that there will be extreme bias and that I, the Plaintiff, will be deprived of Due Process of law under the 5th and 14th amendments of the U.S. Constitution.

9. I, Dwain Lee Kirkland, do hereby depose and swear on my oath that the attached document consisting of 1 page is a true and correct copy to the best of my knowledge and belief of Thomas Hollingsworth's letter of September 16th, 2006.

10. That I wish to attach by reference and incorporate into this affidavit the original of Thomas Hollingsworth's letter of September 16th, 2006.

11. That I first became aware that an order had been issued by Judge Bailey denying the recusal of Judge Tice on September 19th, 2006 when I called Franklin County Superior Court to see if an order had been issued in the past few days in response to Mr. Hollingsworth's letter of September 15th, 2006, a copy of which is sworn to and attached. A deputy clerk of the court made me aware after approximately 3 calls and much questioning that an order denying the recusal of Judge Tice had been signed by Judge Bailey on August 2nd, 2006 and received and filed by the court on or about August 14th, 2006. I have not received a copy of that order nor apparently did Mr. Hollingsworth as he inquired about it in his attached letter of September 15th, 2006. I had called the clerk's office once previously on or about July 17th, 2006 to inquire about the order.

12. That I am filing this Motion to Recuse within one day of first becoming aware that an order denying the recusal had been issued.

(Signed)

_____

By Dwain Lee Kirkland

Sworn to and subscribed before me
this 19th day of September, 2006.

Notary: Tonya Lynn Seay (Signed, embossed seal.)
My commission expires: (02/13/09)

Stamp: Notary Public, Madison County Georgia
My Commission expires February 13, 2009

IN THE SUPERIOR COURT FOR THE COUNTY OF FRANKLIN
STATE OF GEORGIA

DWAIN LEE KIRKLAND,
Plaintiff

vs CIVIL ACTION 05-FV-828T

KELLY TAMPLIN and
OTHERS,
Defendants

ORDER ON PLAINTIFF'S MOTION TO RECUSE JUDGE BAILEY

Plaintiff files this motion seeking to recuse Judge John H. Bailey, Jr. from this case. This case is not assigned to Judge Bailey. Judge Bailey heard, and ruled upon Plaintiffs Motion to Recuse the Hon. Lindsay A. Tise, Jr. who is the assigned judge. This Motion is untimely filed in that the hearing has been held and ruled upon a month and some 17 days prior to the filing of this Motion.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs Motion to Recuse Judge Bailey be, and hereby is **DENIED.**

IT IS SO ORDERED this 21st day of September, 2006.

(Signed)

_____

John H. Bailey, Jr., Chief Judge
Superior Courts, Northern Judicial Circuit

IN THE SUPERIOR COURT OF FRANKLIN COUNTY
STATE OF GEORGIA

DWAIN LEE KIRKLAND,)
Plaintiff,)

(Time stamped)
(2006 SEP 27 AM 8:24)

vs. CIVIL ACTION NO.: 05-FV-828-T

CHRISTOPHER K. TAMPLIN AND)
KELLY TAMPLIN AND OTHERS,)
Defendants.)

ORDER

The Plaintiffs Motion to recuse Judge Lindsay A. Tise, Jr., having come before this Court for hearing, and this Court having considered Plaintiffs Affidavit and argument of the Plaintiff, as well as the argument of counsel for the Defendants, and the Honorable John H. Bailey, Jr. having denied the Plaintiff's Motion to recuse Judge Lindsay A. Tise, Jr.,

IT IS HEREBY ORDERED the Order of Dismissal in the above-captioned case, previously filed on May 2, 2006, and subsequently vacated because of the filing of the Motion to Recuse, is hereby reinstated and the above and foregoing matter is dismissed without prejudice.

SO ORDERED this 22nd day of September, 2006.

(Signed)

_____

Honorable Lindsay A. Tise, Jr.
Superior Court of Franklin County, Georgia

IN THE SUPERIOR COURT OF FRANKLIN COUNTY
STATE OF GEORGIA

Dwain Lee Kirkland,	)	
Plaintiff	)	*(Time stamped: 2006 OCT 23 PM 4:23)*
v.	)	
	)	**Civil Action**
Kelly Tamplin	)	**File No. 05-FV-828-T**
And Others,	)	
Defendants.	)	

NOTICE OF APPEAL

Notice is hereby given that Dwain Lee Kirkland, Plaintiff, and above-named, hereby appeals to the Court of Appeals from the attached Final Order, dismissing Plaintiff's case without prejudice, entered in this action and filed with the court on 09/27/06 at 8:24 A.M.

As per O.C.G.A. 5-6-36 no further motions were filed with the court after the Final Order was entered as above.

The clerk will please omit the following from the record on appeal:

1. None.

The clerk will please include the following from the record on appeal:

1. Complaint and Summons.
2. Sheriff's entries of Service.
3. Plaintiff' Interrogatories to Kelly Tamplin.
4. Plaintiff's Production of Documents to Kelly Tamplin.
5. Amended Complaint with Affidavit filed 02/28/2006.
6. Rule 5.2 Certificates containing Reponses to Item #'s 3 and 4 above, filed 03/01/2006 and 03/02/2006.
7. Affidavit filed 03/10/2006.
8. Defendant's Motion to Dismiss filed 03/23/2006.
9. Plaintiff's Answer, Affidavits and Brief filed 04/20/2006.
10. Motion to Recuse filed 05/01/2006.

11. Brief filed 06/15/2006.
12. Letter, Motion to Recuse, Affidavit filed 09/19/2006.
13. Order Motion to Recuse filed 09/25/2006.
14. Request for Interlocutory Appeal filed 09/25/2006.
15. Order for Dismissal filed 09/28/2006.
16. Motion for Attorney's Fees filed 09/28/2006.
17. Any Responses, Affidavits, Briefs, Orders, Etc., pertaining to Item #16 above.
18. Transcript of April 26th, 2006 Hearing.
19. Transcript of June 20th, 2006 Hearing.
20. Dwain Lee Kirkland's Deposition of March 30th, 2006.
21. In essence, the entire record.

Transcript of evidence and proceedings will be filed for inclusion in the record on appeal.

This court, rather than the Supreme Court has jurisdiction of this case on appeal for the reason that the case is a Personal Injury Tort.

(Signed)

_____

Dwain Lee Kirkland, Pro se

(10/23/2006)

_____

Date

P.O.B. 773
Hull, Ga. 30646
706.788.3158

THIRD DIVISION BLACKBURN, P. J., RUFFIN and BERNES, JJ.

NOTICE: Motions for reconsideration must be physically received in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rules 4 and 37, September 5, 2002) http://www.gaappeals.us/rules/

February 1, 2007

In the Court of Appeals of Georgia
A07A0663. KIRKLAND v. TAMPLIN et al. BL-034

BLACKBURN, Presiding Judge.

Dwain Kirkland (pro se) appeals from the dismissal of his suit against Christopher Tamplin and Kelly Tamplin, contending (1) that the Tamplins' motion to dismiss was untimely, (2) that the trial court erred in ruling that Kirkland's present case was commenced after a similar suit against the Tamplins he filed in a different county, which ruling required the dismissal of the present action, and (3) that the trial court erred in denying two motions to recuse. We disagree and affirm.

The undisputed record shows that at 12:53 p.m. on November 11, 2005, Kirkland filed a complaint in Madison County against Christopher and Kelly Tamplin "and Others," alleging that they committed various wrongful acts including fraud and breach of contract. At 2:07 p.m. on the same day, Kirkland then filed a complaint in

the instant case in Franklin County, making the same allegations against the same defendants.[1] The Tamplins answered, contending inter alia that the Franklin County case was barred by prior pending litigation. The Tamplins subsequently moved to dismiss the Franklin County case, which motion was granted without prejudice. The dismissal order was later vacated by the trial court because Kirkland had, one day prior to the order, filed a motion to recuse the trial court judge, Judge Tise. Following a hearing, a different judge in the same county, Judge Bailey, denied Kirkland's motion to recuse Judge Tise, and thereafter Judge Tise reinstated his prior order dismissing Kirkland's case without prejudice. Kirkland now appeals.

1. Kirkland contends that the trial court erred in granting the Tamplins' motion to dismiss, in that the motion was untimely under

OCGA § 9-11-12 (b) (6). We disagree.

Kirkland argues that the Tamplins' motion should be treated as filed under OCGA§ 9-11-12 (b) (6), i.e. as a motion to dismiss for failure to state a claim upon which relief can be granted. As such, Kirkland argues that the Tamplins' motion was untimely under his reading of the statute.

[1] Kirkland's brief explains that he believed his defendants resided in different counties and was concerned with potential venue problems.

(2)

Without addressing Kirkland's interpretation of the required timing for an OCGA § 9-11-12 (b) (6) motion, we hold that the Tamplins' motion was not based on OCGA § 9-11-12 (b) (6), but rather was based on the prior pending litigation doctrine codified in OCGA § 9-2-5 (a). Accordingly, any alleged time strictures set forth in OCGA § 9-11-12 (b) do not apply. As the pre-trial motion here was timely under OCGA § 9-2-5 (a), we conclude that Kirkland's first enumeration is meritless.

2. (a) Kirkland next contends that the trial court misapplied the prior pending doctrine, arguing that the Madison County complaint was filed simultaneously with the Franklin County complaint, which would allow him to choose which action to prosecute. We disagree.

Under OCGA § 9-2-5 (a),

> [n]o plaintiff may prosecute two actions in the courts at the same time for the same cause of action and against the same party. If two such actions are commenced simultaneously, the defendant may require the plaintiff to elect which he will prosecute. If two such actions are commenced at different times, the pendency of the former shaH be a good defense to the latter.

(Emphasis supplied.) "A civil action is commenced by filing a complaint with the court." OCGA § 9-11-3 (a).

(3)

Here, the undisputed record shows that Kirkland filed the Franklin County complaint (at issue here) 74 minutes after he filed the Madison County complaint. Construing the words "commenced simultaneously" according to their plain meaning, Columbus Ga., Consolidated Government v. Schmidt,[2] we fail to see how a 74-minute delay can be

considered "simultaneous," according to the ordinary meaning of that word. Accord Randolph v. State[3] ("a cardinal rule of statutory construction is 'the ordinary signification shall be applied to all words, except words of art or words connected with a particular trade or subject matter'").

Nor has Kirkland pointed us to any case law to the contrary. Instead, he relies on Clark v. Weaver,[4] in which the appellant contended and the Court "assume[d]" for purposes of the appeal that two cases filed on the same day were filed "'simultaneously at the same moment.'" Here, Kirkland does not assert, nor does the record show that the two cases were filed "at the same moment." Indeed, the Court's use in Clark v. Weaver of the phrase "at the same moment" supports our

[2] Columbus Ga., Consolidated Government v. Schmidt, 269 Ga. 723, 723-724 (507 SE2d 435) (1998).

[3] Randolph v. State, 269 Ga. 147, 150 (2) (496 SE2d 258) (1998).

[4] Clarkv. Weaver, 159 Ga. App. 594 (284 SE2d 95) (1981).

interpretation here and is not consistent with the construction advanced by Kirkland, which would deem a 74-minute time lag to be simultaneous, i.e. "at the same moment."

This is consistent with the purpose of OCGA § 9-2-5, which is simply to provide the mechanism by which the one viable action is to be determined. If the actions are commenced at different times, the plaintiff has no election, must proceed with the initially filed action, and such former suit shall be a good defense to the latter. If, however, the suits are filed simultaneously none of the actions is either "former" or "latter." (punctuation omitted; emphasis supplied.) Clark v. Weaver, supra, 159 Ga. App. at 595. Accord Terrell v. Griffith[5] ("[i]n construing this section the appellate courts have uniformly held that one may not elect to dismiss his first suit where two suits based on the same cause of action were filed at separate times"). Here, as we are able to discern which action was filed first, we do not consider them to be "commenced simultaneously."[6]

[5] Terrell v. Griffith, 129 Ga. App. 675, 677 (200 SE2d 485) (1973).

[6] We note that we do not interpret this statute to require an impossibility, cf. Pope v. U. S. Fidelity &c. Co., 198 Ga. 304, 307 (31 SE2d 602) (1944) ("[a] statute is never to be understood as requiring an impossibility, if such a result can be avoided by any fair and reasonable construction"). First, we note that simultaneous filing is not a right afforded to plaintiffs; rather, it is a rare situation addressed by OCGA § 9-2-5. See Clark v. Weaver, supra, 159 Ga. App. at 595.

As no plaintiff has a right to prosecute multiple identical actions against the same defendants at the same time, the law requires plaintiffs to choose when and where to proceed. Second, nothing prohibits any plaintiff, pro se or otherwise, from coordinating with an agent to have pleadings filed on a certain day at a certain time at a certain place.

(5)

Kirkland also relies on Liner v. North,[7] in which the Court treated two cases filed on the "same date" as simultaneously filed. However, the issue in that case arose from the plaintiff s attempt to prosecute both cases; the timing of the filing was not at issue or discussed in detail. The Liner decision does not analyze the issue of simultaneity and does not further describe the relative filing times of the two cases at issue, and of course two actions filed simultaneously would be filed on the same date. As such, that case is not dispositive here, because Liner's reference to the "same date," without more, does not address the time of filing of the two cases where, as here, simultaneity is challenged. Therefore, we do not depart from the plain meaning and purpose of OCGA § 9-2-5 (a), and we conclude that the trial court properly applied OCGA § 9-2-5 (a).

[7] Liner v. North, 184 Ga. App. 74 (360 SE2d 637) (1987).

(6)

(b) Kirkland alternatively contends that, if the actions are not deemed to be filed simultaneously, the trial court erred in ruling that the Madison County action was filed first. We disagree.

Although the Madison County action was filed 74 minutes before the Franklin County action, Kirkland argues that because he achieved service on the defendants first in Franklin County, the Franklin County case was actually the prior pending action. However, OCGA § 9-2-5 (a) states that "[i]f two actions are commenced at different times, the pendency of the former shall be a good defense to the latter." (Emphasis supplied.) It is true that an action "is not a 'pending suit' between the parties until after service of process." (Punctuation omitted.) Hilton v. Maddox &c. Contractors.[8] However, "[f]iling followed by service creates a pending suit from the date of filing." Id. at 425. See Taylor v. Kohlmeyer & Co.[9] (although "service or waiver is essential, . . . when made it relates back to the date of filing, which

[8] Hilton v. Maddox &c. Contractors, 125 Ga. App. 423, 426 (188 SE2d 167) (1972).

[9] Taylor v. Kohlmeyer & Co., 123 Ga. App. 493, 494 (1) (181 SE2d 496)

(1971).

(7)

establishes the date the action is commenced").[10] Thus, once the suit is served, it is the commencement that is key, and, as stated in OCGA § 9-11-3 (a), a "civil action is commenced by filing a complaint with the court." Accordingly, as between two actions filed and served, the prior action, for purposes of OCGA § 9-2-5 (a), is the one first filed. Therefore, this enumeration is without merit.

3. Kirkland finally contends that the trial court erred in denying two motions to recuse. We disagree.

"This Court employs an abuse of discretion standard in reviewing rulings made upon motions to recuse." (punctuation omitted:) In the Interest of J. E. T.[11]

> In order to disqualify [a] judge, the alleged bias must stem from an extra-judicial source and result in an opinion based on something other than what the judge learned from participating in the case. The trial judge has the duty to determine whether, assuming the truth of the facts alleged, a reasonable person might conclude that the judge harbors bias, stemming from an extrajudicial source, which is of a nature and intensity as would interfere with the exercise of impartial judgment.

10 We note that, although Hilton and Taylor speak in terms of the "date" of filing, they do not address an alleged simultaneous filing. Therefore, we do not rely on them for the purpose of deciding that issue in Division 2.

11 In the Interest of J. E. T., 269 Ga. App. 567, 570 (2) (604 SE2d 623) (2004).

(8)

(Citation and punctuation omitted.) Id. at 571 (2).

(a) Ruling on recusal of Judge Tise. In support of his motion to recuse Judge Tise, Kirkland filed an affidavit summarizing his perception that during oral argument Judge Tise used a tone of "disdain and contempt," Judge Tise "expressed in his behavior that he basically was not listening to the argument and that I could have stopped it right at that moment," and that Judge Tise's "tone and demeanor" suggested he disapproved of the merits of Kirkland's case.

Kirkland argues that it was error to deny his motion to recuse without rebuttal evidence submitted by the Tamplins, who did not submit

evidence on that question. So arguing, he incorrectly relies on OCGA § 9-11-56 (summary judgment) and OCGA § 9-10-111 (verified pleadings). Without addressing his interpretation of those statutes, which do not apply here, we note that the trial court has discretion to rule on the question of whether the movant has overcome his burden to show bias regardless of any evidence presented by the nonmovant. See USCR 25.3 ("[t]he allegations of the motion shall stand denied automatically").

Moreover, upon reviewing the record and transcript, we find no verbal expression of prejudice or bias, nor any improper conduct or relationship to the case,

(9)

on the part of Judge Tise. Cf. In re Burgar[12] ("one cannot be both the prosecuting witness and the judge in our judicial system"). Kirkland's allegations stem from his perceptions of Judge Tise's alleged tone and demeanor, and in the absence of evidence showing a bias from an extrajudicial source, we discern no clear error in Judge Bailey's denial of the recusal motion. See Central of Ga. R. Co. v. Lightsey.[13]

(b) Ruling on recusal of Judge Bailey. After receiving notice that Judge Bailey denied his motion to recuse Judge Tise, Kirkland filed a motion to recuse Judge Bailey, which motion was denied as being untimely. Kirkland's motion was arguably timely, as he asserted in his affidavit that he did not become aware of the adverse ruling until one day before filing his motion to recuse Judge Bailey, but we need not reach that question. In his supporting affidavit, in addition to several irrelevant allegations about other judges he has encountered in Georgia, Kirkland makes two main allegations about Judge Bailey: (1) that at the recusal hearing, Judge Bailey "appeared to be very interested in the case but was perhaps a bit too friendly," and (2) at a subsequent hearing unrelated to the recusal hearing and after Judge Bailey's

[12] In re Burgar, 264 Ga. App. 92, 94 (589 SE2d 679) (2003) (physical precedent only).

[13] Central of Ga. R. Co. v. Lightsey, 198 Ga. App. 59, 60 (1) (400 SE2d 652) (1990).

(10)

ruling on Kirkland's first recusal motion, Judge Bailey did not ask any questions and ruled the same day. First, Judge Bailey's demeanor at a second unrelated hearing occurring after his ruling in the recusal hearing is not relevant to Judge Bailey's impartiality in the recusal hearing.

Second, we fail to see how appearing "very interested" and "friendly" at the recusal hearing in this case evidences "bias, stemming from an extrajudicial source, which is of a nature and intensity as would interfere with the exercise of impartial judgment." (Punctuation omitted.) In the Interest of J. E. T., supra, 269 Ga. App. at 571 (2). See USCR 25.2 ("[a]llegations consisting of bare conclusions and opinions shall not be legally sufficient to support the motion or warrant further proceedings"). Therefore, as this "Court will affirm a judgment, so long as it is right for any reason," Hammack v. Hammack,[14] we affirm the denial of Kirkland's motion to recuse Judge Bailey.

Kirkland's remaining enumerations are moot.

Judgment affirmed. Ruffin and Bernes, JJ., concur.

[14] Hammack v. Hammack, 281 Ga. 202, 203 (635 SE2d 752) (2006).

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

Date: June 25, 2007

Dwain Lee Kirkland
P. O. Box 773
Hull, GA 30646

Case No. S07C0915
DWAIN LEE KIRKLAND v. KELLY TAMPLIN et al.

COURT OF APPEALS CASE NO. A07A0663

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Sears, C.J., Carley and Melton, JJ., who dissent.

Therese S. Barnes, Clerk